SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1066

SALVATORE CIRAMI, and JAMES CIRAMI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SALVATORE CIRAMI, and JAMES CIRAMI,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Salvatore and James Cirami, hereby petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming, January 24, 1975, petitioners' conviction under 26 U.S.C. §§ 7201, 7206(2) in the United States District Court for the Eastern District of New York. A timely petition to enlarge the time for filing a petition for rehearing and a hearing *en banc* seven days to allow new (present) counsel to point out the errors in the opinion below, a review of which is here sought, was denied on February 19, 1975.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, is reproduced in Appendix A of this petition.

Jurisdiction

The jurisdiction of this Court is involved under Section 1254(1), Title 28, United States Code, to review on writ of certiorari the decision of the Court of Appeals entered January 24, 1975, timely petition to enlarge the time for filing a petition for rehearing and hearing *en banc* denied, February 19, 1975.

Questions Presented

1. Is it a fatal variance under an indictment alleging that the petitioners personally owed withholding and F.I.C.A. taxes to allow the prosecution to offer proof that such taxes were actually owed by a corporation?

2. Was it a violation of the petitioners' rights under the Fifth Amendment to be held to answer for a felony only on a grand jury indictment for the trial court to strike as "surplusage", the allegation that petitioners personally owed withholding and payroll taxes which they were charged with evading and allow the prosecution to prove that such taxes were actually owed by a corporation, a charge nowhere contained in the indictment?

3. Should petitioners have been convicted of submitting false forms 1099 under 26 U.S.C. § 7206(2) when those forms disclosed payments to truck drivers which would have been the same disclosure made on form W-2 which the prosecution contended should have been filed?

4. Apart from the immediately foregoing question, should petitioners be awarded a new trial on the last two counts of the indictment because of the erroneous submission of the first seventeen counts to the jury or should those counts be dismissed?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."

Statement of the Case

Petitioners Salvatore and James Cirami are father and son. They were indicted in 73 Cr. 413 for attempted evasion of withholding and payroll taxes, in violation of 26 U.S.C. 7201 in the following language:

> "That during the period from January 1, 1967 to July 31, 1971, inclusive in the Eastern District of New York, the defendants Salvatore Cirami and James Cirami who were the President and Treasurer and Vice President and Secretary respectively of Air Package Distribution Service Ltd., a corporation, with its principal place of business in Queens County, New York, did wilfully attempt to evade and defeat a large part of the federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due and owing to the United States of America for the quarter ending March 31, 1967, by preparing and causing to be prepared and thereafter filing and causing to be filed with the Internal Revenue Service Center,

Andover, Massachusetts, a false and fraudulent employer's quarterly tax return, wherein it was stated that the total taxable wages paid employees for the said quarter was the sum of $13,320.82 and that the total amount of tax withheld and Federal Insurance Contributions Act taxes due thereon was the sum of $1,172.23, whereas, as the defendants then and there well knew, the total taxable wages paid employees for said quarter was the sum of $39,401.82 *upon which wages the defendants owed to the United States of America federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due in the total amount of $3,467.36.*

In violation of Section 7201, Internal Revenue Code; 26 United States Code, Section 7201; 18 United States Code, Section 2." (emphasis added) (A. 3a)*

The same language in italics was common to the first seventeen counts of the indictment. As the Court of Appeals opinion recognizes, that allegation was wrong—characterized in the opinion below as "a mistake"—since the only proof offered in support of the indictment was that a corporation, Air Package Distribution Service, Ltd., owed the taxes in question, not petitioners (A. 40a-41a). An objection was made to the petitioners being tried on a charge not made in the indictment—which the trial court well understood (A. 102a-09a). However the trial court allowed the prosecution to rescue its case by granting its motion to strike the allegation common to the first seventeen counts (italics, *supra*) that it was the petitioners who owed the taxes, not the corporation (A.

* References in the form A. — a are to the appendix on appeal. In the form T. —, references are to the trial transcript.

(109a-17a). In the course of granting the motion to strike, the trial court observed:

> "It goes without saying that there is no question that it is not the defendants that owe the money to the Federal Government." (A. 112a).
>
> "The Grand Jury had no right to charge them with the owing of a corporate tax. . . . That will be surplussage [sic] They cannot be charged with that since they couldn't possibly owe it, it couldn't be in violation of law." (A. 113a)

Nonetheless, the courts below allowed the conviction to be sustained and sentenced petitioners as follows:

Salvatore Cirami on Counts 1-15, a fine of $300.00 each, and a fine of $100.00 each on Counts 17-19, for a total of $4,800.00 (A. 151a).

James Cirami on Counts 1-14 a fine of $100.00 each and on 17-19 of $150.00 each for a total of $2,000.00; with two years probation for both (A151a-2a).

The final two counts (18 and 19) alleged that petitioners violated 26 U.S.C. § 7206(2) by submitting forms 1099 covering remuneration to truckdrivers instead of forms W-2, because the prosecution contended the drivers were employees rather than independent contractors (A. 6a).

Reasons for Granting the Writ

1. Defendants may not be convicted on charges not brought by the Grand Jury.

This Court has held in language, ignored, below that a defendant may not be convicted on charges not brought by the Grand Jury in *Russel* v. *United States*, 369 U. S. 749, 765-768 (1964):

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'" United States v. Cruikshank, 92 US 542, 558, 23 L ed 588, 593. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute." United States v Simmons, 96 US 360, 362, 24 L ed 819, 820. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . ." United States v. Carll, 105 US 611, 612, 26 L ed 1135. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." United States v. Hess, 124 US 483, 487, 31 L ed. 516, 518, 8 S Ct 571. See also Pettibone v. United States, 148 US 197, 202-204, 37 L ed 419, 422, 423, 13 S Ct 542; Blitz v. United States, 153 US 308, 315, 38 L ed 725, 727, 14 S Ct 924; Keck v. United States, 172 US 434, 437, 43 L ed 505, 507, 19 S Ct 254; Morissette v. United States, 342 US 246, 270, note 30, 96 L ed 288, 304, 72 S Ct 240. Cf. United States v.

Petrillo, 332 US 1, 10, 11, 91 L ed 1877, 1884, 1885, 67 S Ct 1538. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.

The vice which inheres in the failure of an indictment under 2 USC §192 to identify the subject under inquiry is thus the violation of the basic principle "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, . . ." United States v. Simmons, supra (96 US at 362). A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in quite different factual setting. Cole v. Arkansas, 333 US 196, 201, 202, 92 L ed 644, 647, 648, 68 S Ct 514. And the unfairness and uncertainty which have characteristically infected criminal proceedings under this statute which were based upon indictments which failed to specify the subject under inquiry are illustrated by the cases in this Court we have already discussed. The same uncertainty and unfairness are underscored by the records of the cases new before us." 369 U.S. at 766.

The same forbidden result occurred in the present case. The grand jury returned an indictment alleging that the

Ceramis owed withholding and other employment taxes. The prosecution not only abandoned that approach but successfully moved to have stricken that essential allegation. Thus the Court of Appeals, the trial court and the prosecution were able to sustain charges which were not only not returned by the grand jury they were contrary to the charges returned by that screening body.

> "As has been held by this Court, the elements of § 7201 are willfulness; the existence of a tax deficiency, Lawn v. United States, 355 U.S. 39, 361, 78 S. Ct. 311, 323, 2 L.Ed.2d 321; Spies v. United States, supra, 317 U.S. at 496, 63 S.Ct. at 366; and an affirmative act constituting an evasion or attempted evasion of the tax, Spies v. United States, supra." *Sansone* v. *United States,* 380 U.S. 350, 351 (1965).

But it was precisely the element of a tax deficiency and by which taxpayer(s) owed that was stricken from the indictment in this case, thus allowing the courts and the prosecution to present any substitution for the judgment of the grand jury guaranteed by the Fifth Amendment.

Cf. *United States* v. *Wilkins,* 385 F.2d 465 (4th Cir. 1967), holding, as has this Court, that a deficiency due and owing by a particular taxpayer is an element of the offense of tax evasion, even though the statute does not specifically so provide. Thus a direct conflict has arisen between the decisions of this Court and those of other Circuits on the elements of the offense of tax evasion and the need to charge them in the indictment.

There is no way in which the decision below can be squared with this Court's decision in *Stirone* v. *United States,* 361 U.S. 212 (1960), where this Court held:

> "Ever since Ex parte Bain, 121 U.S. 1, 7 S. Ct. 781, 30 L.Ed. 849, was decided in 1887, it has been

the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In that case, the court ordered that some specific and relevant allegations the grand jury had charged be stricken from the indictment so that Bain might be convicted without proof of those particular allegations. In holding that this could not be done, Mr. Justice Miller, speaking for the Court, said:

> 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.' 121 U.S. 1, 10, 7 S.Ct. 781, 786.

The Court went on to hold in Bain:

> 'that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney * * *.' 121 U.S. 1, 13, 7 S.Ct. 781, 787.

The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also United

> States v. Norris, 281 U.S. 619, 622, 50 S.Ct. 424, 425, 74 L.Ed. 1076; Cf. Clyatt v. United States, 197 U.S. 207, 219, 220, 25 S.Ct. 429, 431, 432, 49 L.Ed. 726. Yet the court did permit that in this case." 361 U.S. at 215-17.

In *Stirone,* the indictment charged that the defendant had obstructed interstate commerce in connection with the mixing and manufacture of concrete, 361 U.S. at 213-14. The trial court allowed proof that Stirone's extortionary activities could have affected either interstate shipments of steel or sand. 361 U.S. at 214. In reversing Stirone's conviction this Court held:

> "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.[3] Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge." 361 U.S. at 218.

In the light of such a decision, can the result below be allowed to stand where the indictment returned by the grand jury charged petitioners with the evasion of taxes which admittedly they did not owe?

Is there any bound to the sorts of convictions which can be justified *nunc pro tunc* on the justification that the prosecutor was "merely mistaken" when he drafted an indictment?

Must the defendants be required to show that the Grand Jury would not have indicted them if it had been given proper proof or a correctly drafted indictment?

The Fifth Amendment guaranty that no citizen shall be held to answer except on the *Grand Jury's* indictment would seem to place the burden the other way around and require dimissal in this case.

The decision below is in direct conflict with that of the Ninth Circuit in *Paritam Singh Poonian* v. *United States*, 294 F. 2d 74 (9th Cir. 1961). In that case the defendant was indicted (as were petitioners) with evading taxes and making false statements as to them, when in fact the taxes were the obligation of another (Poonian's mother). The Ninth Circuit held:

> "Here, the indictment charged that the appellant had understated 'his' income and sales. Was the personal pronoun mere surplusage? We think not, for it was an allegation crucial to any inference that appellant's allegedly false statements were material.
>
> [3] In support of our conclusion, we note that the income tax return filed by appellant only required that he report 'his' income. It did not require that he report the amounts which constituted income to any other person. Appellant was in much the same position as a nominee of a stock brokerage account. He is not required to report as his own, income in which he has no beneficial interest. It is beside the point that appellant may have been the 'owner' of the income in the general sense. The fact is that we are dealing with a transaction that can only be understood properly if we bear in mind the laws and distinctions peculiar to income tax law. Since, then, appellant only was required to report his own income, and since he only purported to do that, appellant's statement of 'his' income is the only matter in which, as to him,

> the Internal Revenue Service had a legitimate interest.
>
> • • •
>
> The evidence did not prove the charges set forth in the indictment. There was under a law, a fatal variance between the pleading and the proof, and therefore the judgment of conviction must be reversed." 294 F. 2d at 75-6.

Poonian, like the instant case, involved a prosecution for evasion and false statements (the latter there, under 18 U.S.C. §1001, here, under 26 U.S.C. §7206(2)). The Ninth Circuit's opinion approves acquittal on the evasion charges and directs reversal on the false statement charges. A similar result should follow here. At the very least, this Court should grant the writ to resolve the conflict between the circuits in an area that this Court has described as the "capstone" of federal tax felonies. *Spies* v. *United States,* 317 U. S. 492 (1943).

Also in conflict are *United States* v. *Williams,* 412 F. 2d 625, 627-8 (3rd Cir. 1969), where the indictment was dismissed for just such an amendment as occurred below, even though the defendant consented, and *United States* v. *Fischetti,* 450 F. 2d 34, 39 (5th Cir. 1971), *cert. den.* 405 U. S. 1016, where, as here after the trial court granted the motion to strike, the indictment omitted an essential element.

2. The alleged false statements were not criminal, the prosecution was arbitrary and threatens all other innocent taxpayers and filers.

The affirmance below of the convictions on Counts 18 and 19 alleging as false the reporting of the total annual

payments to truck drivers on forms 1099 (on the theory that they were independent contractors) instead of on forms W-2 (on the prosecution's theory that the drivers were employees) is also in conflict with decisions of this Court and those in other circuits. See *Germantown Trust Co.* v. *C.I.R.*, 309 U. S. 304, 308 (1940); *Venus* v. *United States*, 368 U. S. 345 (1961); *Ward* v. *United States*, 344 U. S. 924 (1953); *Stockstrom* v. *C.I.R.*, 190 F. 2d 283, 289 (D. C. Cir. 1951); *Chilhowee Mills, Inc.* v. *C.I.R.*, 152 F. 2d 137 (D. C. Cir. 1945); *Benderoff* v. *United States*, 398 F. 2d 132 (8th Cir. 1968); *Genevieve B. Walker*, 4 T.C. 630, 639 (1966). Those cases stand for the proposition that where a citizen has supplied the Internal Revenue Service or other government agency with the required information (e.g., payments to the truckdrivers) no matter how irregularly, no penalty, even of a *civil* nature attaches even though the government contends that the items complained of should have been reported in another way, on another form.

Since millions of such forms as 1099 and W-2 are required and are routinely filed every year, the conflicts should now be resolved by this Court so that the Internal Revenue Service may not arbitrarily and without notice convert a required form into a weapon for prosecution of those it regards as recalcitrant taxpayers. Here, through a prior audit of the corporate taxpayer, the Service was aware from the corporate books and the filed forms 1099 (admittedly correct as to the amounts paid the drivers), that the drivers were being treated as independent contractors, not as employees, and no withholding or payroll taxes were being collected or paid over (A40a-48a, 51a-57a). Yet instead of notifying the corporation that, in the opinion of the Internal Revenue Service withholding and the filing of payroll tax returns (to which forms W-2 relate) were required, as is specifically pro-

vided by Section 31.6011(a)-5 of the Treasury Regulations, Internal Revenue initiated this prosecution. To prevent this from happening to other taxpayers, it would seem imperative that this Court now declare, that the principle stated in *Spies* v. *United States,* 317 U. S. 492, 496 (1943) as to what is now 26 U.S.C. §7201 also applies to prosecutions under 26 U.S.C. §7206(2):

> "It is not the purpose of the law to penalize frank difference of opinions or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay." 317 U. S. at 496.

There can be little question that had the Second Circuit found that petitioner should have been acquitted under the first seventeen counts because of the constitutional violations first discussed, under which counts the bulk of the evidence was erroneously admitted, it would also have reversed the convictions under the last two, which were in any event invalid. See *Rutkin* v. *United States,* 343 U. S. 130, 133 n. 4 (195); *United States* v. *Casale Car Leasing Inc.,* 385 F. 2d 707 (2d Cir. 1967); see also *United States* v. *Barash,* 365 F. 2d 395 (2d Cir. 1966).

CONCLUSION

For the reasons stated, it is respectfully prayed that this petition be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1179—September Term, 1973

Argued July 16, 1974—Decided January 24, 1975

Docket No. 74-1492

UNITED STATES OF AMERICA,

Appellee,

—against—

SALVATORE CIRAMI and JAMES CIRAMI,

Appellants.

Before:

MULLIGAN and WINTER,* *Circuit Judges*, and NEWMAN,** *District Judge.*

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* of the United States Court of Appeals, Fourth Circuit, sitting by designation.

** of the United States District Court, District of Connecticut, sitting by designation.

Appendix A

Appeal by Salvatore and James Cirami from conviction for attempted evasion of taxes and aiding in the preparation of false information returns, after trial before a jury in the United States District Court for the Eastern District of New York, Mark A. Constantino, *District Judge.*

Affirmed.

Robert E. Scher, New York, New York (*Raphaels, Searles, Vischi, Scher, Glover & D'Elia,* on the brief), *for Appellants.*

Richard B. Buhrman, Attorney, Tax Division, U.S. Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Ernest J. Brown, Crombie J.D. Garrett, Attorneys, Tax Division, U.S. Department of Justice, Washington, D.C., and Edward J. Boyd, U.S. Attorney for the Eastern District of New York, on the brief), *for Appellee.*

NEWMAN, District Judge:

Salvatore and James Cirami appeal from multi-count convictions for revenue law violations. The appellants are principal officers of Air Package Distribution Service Ltd. (hereinafter "the corporation"), a trucking company that provides pickup and delivery service to airlines. The corporation sought to classify its truck drivers as independent contractors, rather than employees, thereby attempting to evade its obligation for paying taxes imposed by the Federal Insurance Contributions Act (social security) and the Federal Unemployment Tax Act.

Appendix A

A nineteen-count indictment charged the Ciramis with three sets of violations. Counts 1 through 14 alleged that they attempted to evade social security taxes due for fourteen calendar quarters in 1967 through 1970 by filing false and fraudulent employer's quarterly tax returns understating the amount of taxable wages paid, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2. Counts 15 through 17 alleged similar violations with respect to attempted evasion of federal employment taxes for the years 1967, 1968, and 1969. Counts 18 and 19 alleged that the appellants, in violation of 26 U.S.C. § 7206(2), aided and assisted in the preparation of false United States Information Returns (forms 1099) for the years 1968 and 1969, which stated that the recipients of payments from the corporation were independent contractors rather than employees. After a trial before Judge Mark A. Costantino and a jury, appellants were convicted on eighteen of the nineteen counts, Count 16 having been dismissed. Appellants were sentenced to pay fines on each of the eighteen counts resulting in conviction, and were also placed on probation.

Appellants' attack upon the sufficiency of the evidence is without merit, and no useful purpose would be served by detailing the circumstances from which the jury was abundantly justified in concluding, under unchallenged and proper instructions, that the truck drivers were regular employees of the corporation and that both appellants wilfully participated in the attempt to evade corporate taxes by filing false returns that concealed the employee status of the drivers.

The principal issue on appeal arises because of a mistake made by the Government in drafting for the Grand Jury's consideration the first seventeen counts of the in-

dictment. Count 1, set out in full in the margin,[1] was drafted in an effort to follow the standard form for alleging attempted evasion of corporate taxes by responsible corporate officials. The manner of attempted evasion was alleged to be the filing by the appellants of false employer's quarterly returns. The falsity was alleged by comparing the wages reported to have been paid some employees and the taxes due thereon with the higher amount of wages actually paid to all employees and the corresponding higher amount of taxes due thereon. The mistake occurred when it was alleged that the higher amount of taxes was owed by the appellants, rather than by the

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[1] "That during the period from January 1, 1967 to July 31, 1971, inclusive in the Eastern District of New York, the defendants Salvatore Cirami and James Cirami who were the President and Treasurer and Vice President and Secretary respectively of Air Package Distribution Service Ltd., a corporation, with its principal place of business in Queens County, New York, did wilfully attempt to evade and defeat a large part of the federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due and owing to the United States of America for the quarter ending March 31, 1967, by preparing and causing to be prepared and thereafter filing and causing to be filed with the Internal Revenue Service Center, Andover, Massachusetts, a false and fraudulent employer's quarterly tax return, wherein it was stated that the total taxable wages paid employees for the said quarter was the sum of $13,320.82 and that the total amount of tax withheld and Federal Insurance Contributions Act taxes due thereon was the sum of $1,172.23, whereas, as the defendants then and there well knew, the total taxable wages paid employees for said quarter was the sum of $39,401.82 upon which wages the defendants owed to the United States of America federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due in the total amount of $3,467.36.

In violation of Section 7201, Internal Revenue Code; 26 United States Code, Section 7201; 18 United States Code, Section 2."

corporation. After alleging the correct amount of wages to be $39,401.82, Count 1 continued: "upon which wages the defendants owed to the United States of America federal incomes taxes withheld from wages and Federal Insurance Contributions Act taxes due in the total amount of $3,467.36." The deletion of the quoted words, and of corresponding language from Counts 2 through 17, upon motion by the Government after it had rested, is challenged by appellants as a denial of their Fifth Amendment right to trial upon an indictment of a grand jury.

Ever since the Supreme Court announced in *Ex parte Bain,* 121 U.S. 1 (1887), that an indictment cannot be amended except by resubmission to a grand jury, the law has been in a "confused state," *United States* v. *Edwards,* 465 F.2d 943, 950 (9th Cir. 1972), as to whether any alteration is permissible and if so, how any appropriate changes may properly be made. While a "no amendment" rule has been stated, *e.g., Dodge* v. *United States,* 258 F. 300 (2d Cir.), *cert. denied,* 250 U.S. 660 (1919), changes of various sorts have in fact been approved, *e.g., United States* v. *Colasurdo,* 453 F.2d 585 (2d Cir. 1971), *cert. denied,* 406 U.S. 917 (1972). See cases collected in *Heisler* v. *United States,* 394 F.2d 692, 695-96, nn. 2-6 (9th Cir.), *cert. denied,* 393 U.S. 986 (1968). The Supreme Court has stated that a "useless averment" of an indictment may be ignored, *Ford* v. *United States,* 273 U.S. 593, 602 (1927), and courts have regularly permitted juries to disregard as surplusage language in an indictment not essential to the allegations of the offense charged. See, *e.g., United States* v. *Archer,* 455 F.2d 193 (10th Cir.), *cert. denied,* 409 U.S. 856 (1972); *United States* v. *Colasurdo, supra.*

Despite this modern line of cases, uncertainty has persisted as to the propriety of withdrawing indictment language from a trial jury's consideration because *Bain*, which "has never been disapproved," *Stirone* v. *United States*, 361 U.S. 212, 217 (1960), itself involved the withdrawal from the jury's consideration of language not essential to the offense charged. Bain, an officer of a banking association, was charged with making a false report with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of the association. The trial court eliminated the reference to the Comptroller of the Currency. The Supreme Court reversed even though the balance of the indictment adequately stated an offense. The Court was concerned that the grand jury might have indicted only because the Comptroller of the Currency had been deceived. 121 U.S. at 10. Implicit in this holding is the view that the Fifth Amendment protects a defendant from being tried on minimally sufficient allegations of an offense unless a grand jury has made the prior determination that it considers those allegations sufficient to warrant the exercise of its prosecuting discretion. See *Gaither* v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969).

This Court has viewed *Bain* as holding that some deletions of unnecessary language may work an impermissible "fundamental change" in the charge set forth in an indictment, even though a legally sufficient allegation remains. See *United States* v. *Colasurdo*, *supra*, 453 F.2d at 590. That type of change, involving the disregard of language that might well have had a significant bearing on the grand jury's decision to indict, may still violate the *Bain* rule. Even this interpretation of *Bain* may have been eroded by the Supreme Court's opinion in *Stirone* v.

United States, supra, which interpreted *Bain* as standing for "the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." 361 U.S. at 217. This view appears to express concern only with the addition of charging language, rather than its deletion.

The disregarded portions of the indictment in this case were plainly surplusage. The manner of an attempted evasion of income taxes has been deemed not essential to a valid indictment. *Hayes* v. *United States,* 407 F.2d 189 (5th Cir.), *cert. dismissed,* 395 U.S. 972 (1969); *Heasley* v. *United States,* 218 F.2d 86 (8th Cir.), *cert. denied,* 350 U.S. 882 (1955). Here, the manner of attempted evasion—filing false returns—was adequately stated even after the deletion, the omitted words concerning only the correct amount of taxes due. Nor do we think there is any substantial likelihood that the grand jury would have failed to indict the appellants for their actions in wilfully filing false returns even if the grand jurors had understood that the taxes were due from the corporation and not from the appellants.

Appellants further contend that the deletions that occurred here caused them prejudice because of the manner in which they chose to defend. At trial the I.R.S. special agent acknowledged, on cross-examination, that no notice had been given the corporation of its obligation to pay social security taxes for its employees, nor had any assessment been made of taxes due. Of course, no notice or assessment was necessary prior to a prosecution for attempted evasion. *Ford* v. *United States,* 233 F.2d 56 (5th Cir.), *cert. denied,* 352 U.S. 833 (1956). In any event neither the cross-examination of the spe-

cial agent, nor any other evidence developed at the trial, sought to place the obligation to pay taxes upon the appellants or to shift it to the corporation, where it belonged. The jury's attention was simply never directed to the question of who was liable for payment of taxes, an issue of no relevance in this attempted evasion case. This case is thus totally unlike *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970), where substantial evidence was submitted to the jury in support of allegations subsequently withdrawn from the jury's consideration. The deletion here caused no prejudice.[2]

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[2] Appellants allege one particular respect in which they were prejudiced by the deletion, or, more precisely, by the prosecutor's failure to respect the deletion. The summation includes the following:

> "Evidence in this case, I submit, points very strongly to that Mr. Cirami was a man of expediency. In this case, he saved approximately $34,000 by this scheme.
>
> Mr. Hollman: I object to that.
>
> Mr. Myerson: That is the amount in the indictment.
>
> The Court: No, sustained.
>
> Mr. Myerson: I submit, ladies and gentlemen, if you find Mr. Cirami did that, it will add up to the approximate figure of $34,000.
>
> Mr. Hollman: I object to that.
>
> The Court: Sustained.
>
> Mr. Myerson: You can add it up, ladies and gentlemen."

Plainly, it was improper for the prosecutor to argue to the jury the total amount of taxes saved, when there was no evidence to support these figures, and when the allegations of the indictment, upon which he sought to rely, had been stricken from the indictment at his request. It is also inexcusable for him to have persisted in this improper argument after objection to it had twice been sustained.

(Footnote continued on following page)

Appendix A

One further aspect of the alteration of the indictment warrants additional comment, the manner of accomplishing the deletion. The Ninth Circuit has pointed out the anomaly of permitting trial judges to instruct juries to disregard certain portions of an indictment, yet prohibiting a physical correction of the indictment papers to reflect the deletion. *Heisler* v. *United States, supra.* Yet convictions have been overturned where language, conceded to be surplusage, had been crossed out on the face of the indictment. See, *e.g., Stewart* v. *United States,* 12 F.2d 524 (9th Cir. 1926).[3]

In *United States* v. *Wolfson, supra,* this Court considered deletion of indictment language accomplished by covering the words to be omitted with opaque paper on which was written, "This portion of indictment stricken as a matter of law; it is not to be considered by the jury." 437 F.2d at 868. The decision did not question this physical alteration of the indictment, though convictions were reversed because of the prejudicial effect of the evidence admitted in support of the deleted allegations.

(Footnote continued from preceding page)

Under all the circumstances, however, no prejudice resulted. The prosecutor was referring to Salvatore Cirami, president of the corporation, who had acknowledged that the corporation was "his own company." It was proper to argue, as bearing on motive, that the principal officer of his own corporation stood to gain money by attempting to evade corporate taxes. The improper reference to the amount of taxes does not warrant reversal.

[3] The manner of altering the face of the indictment in *Stewart* is explained in *Stewart* v. *District Court,* 16 F.2d 863 (9th Cir. 1926), *cert. denied,* 273 U.S. 755 (1927).

Appendix A

In the instant case, we are neither asked to decide, nor do we express, any view as to whether the jury is to inspect an indictment in any or all criminal prosecutions. But, if a jury is permitted to see the individual indictment, and if any language of that indictment is surplusage or other matter that a jury may properly be instructed to disregard, we think the preferable course is to prepare a retyped "clean" version of the indictment, omitting the language to be disregarded without any indication of its omission. If the language is not to be considered by the jury, it is surely better to remove it from their scrutiny, rather than rely on instructions. Crossing out or covering the deleted words only serves to arouse the jury's curiosity and stimulate unwarranted speculation as to the full scope of the original allegations. Of course, in situations where the original indictment has been read to the jury or where a deletion leaves the remaining language awkward or unclear, a trial judge may, especially if the defendant prefers, permit the jury to see the original indictment and deal with the deletion in the court's instructions.

In this case, the deletion was accomplished by placing brackets on the face of the indictment around the words to be deleted. However, it appears that the indictment, thus marked, was never submitted to the jury. Apparently, it is not the routine practice in the Eastern District of New York to submit indictments to the trial jury, and the jury in this case made no request to see the indictment. In his charge, Judge Costantino simply read to the jury Counts 1, 15, and 17, which were illustrative of the three sets of offenses charged, and in doing so, omitted the language that he had ordered stricken. Thus, the jury received an entirely adequate statement of the

offenses alleged, and their attention was never directed to the fact that the improper allegation concerning taxes owed by the appellants had been originally included in the indictment and thereafter deleted. Since the jury never saw the indictment, the absence of a clean, retyped indictment is of no consequence.

The judgments of conviction are affirmed.

APPENDIX B

Order of the United States Court of Appeals for the Second Circuit, Affirming Judgment

74-1492

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and seventy-five.

Present:

HON. HARRISON L. WINTER
HON. WILLIAM H. MULLIGAN
Circuit Judges
HON. JON O. NEWMAN
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVATORE CIRAMI & JAMES CIRAMI,

Defendants-Appellants.

Appendix B

Appeal from the United States District Court
for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. Daniel Fusaro,
Clerk
By Vincent A. Carlin,
Chief Deputy Clerk

A true copy

A. Daniel Fusaro
Clerk
by: Vincent A. Carlin
Vincent A. Carlin,
Chief Deputy Clerk

APPENDIX C

Order of the United States Court of Appeals for the Second Circuit, Denying Motion for Extension of Time

74-1492
A 22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of February, one thousand nine hundred and seventy-five.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVATORE CIRAMI & JAMES CIRAMI,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated Feb-

ruary 7, 1975 to extend the time to file a petition for rehearing and rehearing *en banc* to and including seven days after the grant of this motion or for a stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is denied.

HARRISON L. WINTER (MDD)
Harrison L. Winter

WILLIAM H. MULLIGAN
William H. Mulligan

JON O. NEWMAN (MDD)
Jon O. Newman
Circuit Judges